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EVIDENCE—DEMONSTRATIONS BEFORE THE JURY

The question has often arisen as to how far one may proceed with demonstrations in the presence of the jury before it will be held to be prejudicial error. The general rule seems to be that it is within the discretion of the trial court.¹

Demonstrations before the jury are of two kinds, personal demonstrations and mechanical demonstrations. The purpose of this note is to discuss the limitations and modifications placed upon the trial court's discretion in both situations.

In personal demonstrations where the plaintiff has been injured permanently a demonstration is permissible to show the extent and nature of the injury,² unless it will arouse the passion and sympathy of the jury so as to prejudice the opposing party and lead to an excessive judgment.³ The cases present a wide difference of judicial opinion as to what will create prejudice and passion in the minds of the jurors,⁴ but the view of the majority seems to be that if there is neither an open wound⁵ nor a loud exclamation of pain,⁶ the passion of the jury is not excited so as to create prejudice. Many of these situations seem to be merely an examination of the injuries rather than a demonstration.

Many demonstrations as to the extent of an injury or the capacity of an injured plaintiff to do certain things are susceptible to the practice of deceit and fraud upon the court and, to prevent this, the discretion of the trial court should not be loosely used. Whenever the demonstration might possibly lead to a practice

¹ *Willoughby v. Zylstra*, 5 Cal. App. 2d 297, 42 P. 2d 685 (1935); *Ohio County Drug Co. v. Howard*, 201 Ky. 236, 256 S. W. 705 (1923); *Zeller v. Mayson*, 168 Md. 663, 179 Atl. 179 (1935); *Posell v. Herscovitz*, 237 Mass. 513, 130 N. E. 69 (1922); *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130, 22 N. W. 176 (1885).

² II WIGMORE, EVIDENCE (3d ed. 1940) sec. 445.

³ *Cass v. Pacific Mut. Life Ins. Co.*, 62 S. D. 509, 253 N. W. 626 (1934).

⁴ *Willoughby v. Zylstra*, 5 Cal. App. 2d 297, 42 P. 2d 685 (1935) (not improper to permit a medical witness to manipulate fingers on injured person's neck and to pinch injured vertebrae in presence of jury); *Meyer v. Johnson*, 224 Mo. App. 565, 30 S. W. 2d 641 (1930) (improper for medical witness to run fingers over injured person's neck and to pinch injured parts of body in presence of jury); *Anthony v. Public Transit Co.*, 130 Atl. 895 (N. J. 1925) (not improper to allow an attorney to stick pin in plaintiff's arm in presence of jury); *Madison Coal Corp. v. Attmire*, 215 Ky. 283, 284 S. W. 1068 (1926) (improper to allow attorney to stick needle in arm of plaintiff in presence of jury); *Herter v. City of Detroit*, 245 Mich. 425, 222 N. W. 774 (1929) (no error in permitting doctor to move plaintiff's shoulder and elbow joint by using his arm, causing exclamation of pain in presence of jury); *Peters v. Hockley*, 152 Ore. 434, 53 P. 2d 1059 (1936) (error to permit doctor to raise plaintiff's arm in presence of the jury while she cried out in pain).

⁵ *Sears v. Goldsmith*, 136 Ore. 151, 298 Pac. 219 (1931).

⁶ *Peters v. Hockley*, 152 Ore. 434, 53 P. 2d 1059 (1936).

of fraud or deceit, the court, within the exercise of its discretion, should deny the evidence by way of a demonstration. This is because it is an imposition that cannot be controverted by other proof or by cross examination,⁷ since neither would show whether or not the person upon whom the demonstration is being performed is faking or exaggerating the extent of his injury. The demonstration should also be denied when the plaintiff is not under oath and is not subject to cross examination,⁸ since in such a situation the plaintiff's demonstrative testimony could be subject to exaggeration or fabrication without the plaintiff being subject to a charge of perjury.

The courts have also said that a demonstration will not be allowed when it is likely to cause further injury or to endanger the health and safety of the person upon whom the demonstration is to be made.⁹ This is a commendable modification or limitation on the court's power, as the court should be an instrument for the protection of the plaintiff when he seeks recovery for injuries caused by the defendant and is likely to be subjected to a demonstration which would cause him further injury. If it were not for this limitation, demonstrations of this type could be carried to such an extreme that injured persons having just claims to damages would fail to prosecute those claims for fear of further injury or danger.

Mechanical demonstrations are subject to somewhat different limitations. The most common limitation on the court's discretion in regard to such demonstrations is that the conditions at the time of the demonstration be the same as those in the case at issue.¹⁰ However, the court carried this rule to an extreme in *Daniels v. Stock*,¹¹ which was an action for damages for a scratch on the leg received in a public bath. A demonstration to show that the injury could not have been received in the way alleged was held improper in the absence of proof of the similarity of tubs and legs. This is one of the more amusing cases showing how far the court's discretion may go, but the other cases show the propriety of this rule and how the court has guarded its discretion. A New York case held that when there is a demonstration before the jury to test by chemical application the quality and composition of the ink on a writing which is in question, such demonstration will not be allowed unless preliminary preparations have been made for safeguarding the present actual condition of the paper offered.¹²

⁷ *Stewart v. Weiner*, 108 Neb. 49, 187 N. W. 121 (1922).

⁸ *Gulf Refining Co. v. Frazier*, 15 Tenn. App. 662 (1932).

⁹ *Stearns Coal & Lumber Co. v. Williams*, 177 Ky. 701, 198 S. W. 54 (1917).

¹⁰ *Spires v. State*, 50 Fla. 121, 39 So. 181 (1905); *Western Electric Co. v. Prochaska*, 129 Ill. App. 589 (1906); *Leonard v. Southern Pacific Co.*, 21 Ore. 555, 28 Pac. 887 (1892).

¹¹ 23 Colo. App. 529, 130 Pac. 1031 (1913).

¹² *In re Gartland's Will*, 69 Misc. Rep. 33, 112 N. Y. S. 719 (1909).

A recent case held that a demonstration by a physician that he could drink the same amount and same kind of ground glass that the plaintiff allegedly drank was not proper, because the mental reactions of the plaintiff and the physician would not be the same after drinking the glass. This decision seems in accord with the limitation, since the conditions under which the plaintiff swallowed the glass and the conditions under which the physician swallowed the glass would not be the same.¹³

Evidence by way of demonstrations should be received with caution, and be admitted only when it is obvious to the court, from the nature of the offer, that the jury will be enlightened rather than confused.¹⁴ In many instances a slight change in the conditions under which the experiment is made will so distort the result as wholly to destroy its value as evidence and make it harmful rather than helpful. The value and weight of demonstrations as evidence should always be left for the jury's consideration and determination.¹⁵

In conclusion, demonstrations of both types, personal and mechanical, should be allowed to determine a disputed fact and to enlighten and clarify issues for the jury, (1) when it can be done safely without danger to anyone, (2) where there is no opportunity to perpetrate a fraud on the court and (3) when it will not be prejudicial.

VILEY O. BLACKBURN

PARTNERSHIPS—TITLE TO REAL PROPERTY

For many purposes, in the absence of statutes, a partnership is not looked upon as a legal entity. It cannot sue or be sued in its own capacity. All suits involving the partnership must be brought by or against the individuals occupying the relation of partners.¹ On the other hand, a partnership at common law was deemed to have some existence in itself which allowed it, as an entity, certain rights and imposed upon it certain obligations distinct from the rights and obligations of the individual partners. Contracts could, for example, be made or taken in the firm name.²

This dual concept is well illustrated by the different situations that arise in regard to the property rights of a partnership. It is generally held that a partnership may not take, hold or convey legal title to real property,³ but a partnership may own personal

¹³ *Coca-Cola Bottling Co. of Ark. v. Lanston*, 198 Ark. 59, 127 S. W. 2d 263 (1939).

¹⁴ *Landro v. Great Northern R. Co.*, 117 Minn. 306, 135 N. W. 991 (1912); *Sullivan v. Minneapolis, St. P. & S. S. M. R. Co.*, 55 N. D. 353, 213 N. W. 841 (1927).

¹⁵ *Willoughby v. Zylstra*, 5 Cal. App. 2d 297, 42 P. 2d 685 (1935).

¹ MECHAM, *ELEMENTS OF THE LAW OF PARTNERSHIP* (2d ed. 1920) sec. 6.

² *Ibid.* at sec. 123.

³ *Adams v. Church*, 42 Ore. 270, 70 Pac. 1037 (1902); MECHAM, *ELEMENTS OF THE LAW OF PARTNERSHIP* (2d ed. 1920) sec. 153.